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April 28, 1954  
Opinion No. 54-63

TO: Mr. Julian McClure  
Deputy Registrar of Contractors  
4765 E. Baker  
Tucson, Arizona

RE: Registrar of Contractors.

QUESTIONS: (1) Is there an unconstitutional delegation of legislative power to the Registrar of Contractors by Sections 67-2301 through 67-2326, A.C.A. 1939, as amended, wherein the registrar is permitted to adopt rules and regulations necessary to effect classifications of contractors?  
(2) Does the classification of contractors, by the Registrar of Contractors, under the above mentioned statutes, constitute an unconstitutional definement of crimes by administrative rule?

It is the considered opinion of the Department of Law that Sections 67-2301 through 67-2326, A.C.A. 1939, as amended, do not unconstitutionally delegate legislative authority to the Registrar of Contractors, nor is the classification of contractors by the registrar under this act, an unconstitutional definement of crimes by administrative rule. The following parts of the contracting act bear particularly on the question at hand:

"67-2302. License required.-- It shall be unlawful for any person, firm, co-partnership, corporation, association or other organization, or any combination of any thereof, to engage in the business or act or offer to act in the capacity or purport to have the capacity of contractor without having a license therefor as provided in this act, \* \* \*

"67-2304. Classifications.--(A) For the purpose of classification, the contracting business shall include general engineering contracting, general building contracting, and specialty contracting.

(B) A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works for any or all of the following divisions or subjects: irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, railroads, highways, tunnels, airports and airways, sewerage and bridges. A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind requiring in its construction the use of more than two (2) unrelated building trades or crafts or to do or superintend the whole or any part thereof, but does not include anyone who merely furnishes materials or supplies as provided in section 3 (§67-2303) without fabricating them into or consuming them in the performance of the work of the general building contractor. A specialty contractor is a contractor whose operations as such are the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts including, but not limited to, construction of smelters, crushing plants, mills and other specialized structures for use in connection with the reduction of mineral bearing ores."

"67-2323. Rules and regulations.---(A) The registrar may adopt rules and regulations necessary to effect the classification of contractors in a manner consistent with established usage and procedure as found in the construction business and may limit the field and scope of the operations of a licensed contractor within any of the branches of the contracting business hereinabove described to those divisions thereof in which

he is classified and qualified to engage. A licensee may make application for classification and be classified in more than one (1) classification or division thereof after licensee meets the qualification prescribed by the registrar for such additional classification or classifications. Separate applications shall be required and separate license fees shall be charged for qualifying or classifying a licensee in additional classifications."

\* \* \* \* \*

"67-2319. Penalty.--Any contractor who:  
\* \* \* 2. acts in the capacity of a contractor within the meaning of this article without a license as herein required; \* \* \* is guilty of a misdemeanor and shall upon conviction be punished by a fine of not less than one hundred (\$100) nor more than three hundred dollars (\$300), imprisonment not to exceed six (6) months, or both."

There have been several Arizona cases touching upon the general subject of this opinion. The first such decision is the case of DENT vs UNITED STATES, (1903) 8 Ariz. 138; 71 Pac. 920. This case held that the Act of Congress of June 4, 1897, which provided that the Secretary of the Interior may make rules and regulations to regulate the occupancy and use of forest reservation and to preserve the forest thereon, and that any violation of such rules and regulations shall be punished as provided for in the Act of Congress of June 4, 1883, amending Section 5388 of the revised statutes of the United States, was an unconstitutional delegation of legislative power to the Secretary of the Interior insofar as it authorized him, by rule or regulation to specify acts, the performance, of which, shall constitute a crime. However, the decision in this case was reversed in DENT vs UNITED STATES, on Rehearing, (1904). This case is found in 8 Ariz. 413, 76 Pac. 455. On rehearing, the Court held that this act was not an unconstitutional delegation of power to the Secretary of the Interior. The situation in the DENT case is, for all intents and purposes, synonymous with the existing situation under our present Registrar of Contractor's Law.

In the Arizona case of HUNT vs DOUGLAS LUMBER COMPANY, (1933) 41 Ariz. 276, 17 P.2d 815, the Arizona Supreme Court held that the then existing Registrar of Contractor's Law was within the police power of the State.

The Arizona case of STATE vs ANKLAM, (1934) 43 Ariz. 362, 21 P.2d 888, is in point. This case held that a statute which prescribed that a person doing manual or mechanical labor, employed by or on behalf of the State or its political subdivisions, should be paid a minimum wage, to be fixed by the State Highway Commission, was not invalid for failure to describe an offense with sufficient certainty. This case also held that legislative adoption of a minimum wage fixed by the State Highway Commission, to be paid by the State and its political subdivisions, for manual and mechanical labor, was not a surrender of legislative power to the Highway Commission.

The following quotations are from this case:

\* \* \* \* \*

"In the first place, all an employer has to do is to inquire of the state highway commission whether it has fixed a minimum per diem wage for the class of manual or mechanical labor he proposes to employ and if it has pay such wage to his employees. If it has not fixed such minimum per diem wage, he may, without incurring criminal liability, pay his employees such wages as they may agree upon. Or, if he is paying the wages fixed by the commission, and such wages should be changed without his knowledge, and he should be arrested for not complying with the change, he could defend on that ground. It would be a question of fact whether he knew of the change or not. It is true that the mere doing of an act forbidden by statute in some kinds of cases makes out the crime, but, where the criminality of the act is made to depend upon a rule or order of the state highway commission or other agency, the person charged with its violation should be permitted to show that he did not knowingly do so.

The right and power of the legislature to delegate to the state highway commission authority to fix minimum wages for manual and mechanical labor when performed for the state and its political subdivisions is well settled. In 6 Ruling Case Law, page 181, section 181, it is said:

'While the legislature cannot delegate to a board or to an executive officer the power to

declare what acts shall constitute a criminal offense, it is competent for it to authorize a commission to prescribe duties on which the law may operate in imposing a penalty and in effectuating the purpose designed in enacting the law. . . . In a case where the statute itself prescribes punishment for violation of a regulation of a board or commission, it cannot be said that it is unconstitutional on the theory that legislative power to create crimes is delegated to such body. A specific illustration of the application of this principle is presented where it is held that legislative power delegated to the secretary of agriculture by the provisions of the forest reserve act, making criminal the violation of the rules and regulations covering forest reservations made and promulgated by him under authority of such statutes, is constitutional.' See, also, Metropolitan Water District v. Whitsett, 215 Cal. 400, 10 Pac. (2d) 751; Ex parte Steiner, 68 Or. 218, 137 Pac. 204; Byars v. State, 2 Okl. Cr. 481, 102 Pac. 804, Ann. Cas. 1912A 765. (Italics underscored)

The legislative adoption of a minimum wage fixed by the state highway commission, to be paid by the state and its political subdivisions for manual and mechanical labor, is not a surrender of legislative power to the highway commission. The law operates upon a fact to be ascertained by the highway commission and itself creates the crime.

It is the well-settled rule that:

'A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.' State v. Jay J. Garfield Bldg., Co., supra. (Italics underscored.)

An employer of manual or mechanical labor for the state or its political subdivisions can under the above statute, by exercising ordinary intelligence and care, choose in advance what is lawful for him to do. In other words, he should have no trouble in ascertaining the per diem wage he should pay. His course is plain and easy to follow. He can make no mistake if he will use his wits. The statute prescribes a definite certain standard of conduct, and he can have no legitimate reason for not observing it.

\* \* \* \* \*

Defendants have cited many cases which under the facts therein have decided against laws attempting to define crimes, the elements of which were not ascertainable in advance, but they are not applicable here, for the reason that the statute under which defendants are being prosecuted plainly and clearly informs them what they may do to avoid criminality. We do not deem it necessary to discuss such cases except to say they were correctly decided upon the facts."

\* \* \* \* \*

The following quote from the Arizona case of HAGGARD vs INDUSTRIAL COMMISSION, (1950) 71 Ariz. 91, 223 P.2d 915, sheds some light on this question by the following language:

\* \* \* \* \*

"But, assuming that this rule does not apply in the present case, we think the delegation of power by the legislature to the commission in Sec. 56-923, supra, is not unconstitutional. The ordinary rule, of course, is that legislative powers cannot be delegated to administrative bodies. Loftus v. Russell, 69 Ariz. 245, 212 P.2d 91; Tillotson v. Frohmiller, 34 Ariz. 394, 271 P. 867; Crane v. Frohmiller, 45 Ariz. 490, 45 P.2d 955. But this does not mean that when authorized to do so by the act itself administrative bodies may not make rules and regulations supplementing legislation for its complete operation and enforcement, if such rules and regulations are within the standards set forth in the act of the legislature. Tillotson v. Frohmiller, supra." (Italics underscored)

\* \* \* \* \*

The Arizona case of *STATE vs MARANA PLANTATIONS, INC.*, (1953) 75 Ariz. 111, 252 P.2d 87, no doubt will be cited by those who would urge that the present Registrar of Contractors Law is unconstitutional. In this case, a statute which gave unlimited regulatory power to the State Board of Health, with no prescribed restraint, criteria, or guide to action, was held unconstitutional as a delegation of legislative power. Justice Windes, in rendering this opinion, made the below statement:

\* \* \* \* \*

"\* \* \* To use the apt phraseology of the late Justice Cardozo in *Schechter Poultry Corporation v. United States*, 295 U. S. 495, 55 S.Ct. 837, 852, 79 L.Ed. 1570, an administrative board cannot be 'a roving commission to inquire into evils and upon discovery correct them' and it must be 'canalized within banks that keep it from overflowing.' It cannot be 'unconfined and vagrant.'"

\* \* \* \* \*

From a reading of the statutes, 67-2302, 67-2304, 67-2323, 67-2319, supra, it becomes immediately apparent that the power and authority and the duty of the Registrar of Contractors has been properly "canalized."

The Registrar, under Section 67-2323, may adopt rules and regulations to effect the broad classifications set forth in Section 67-2304, but these rules and regulations must be consistent with the established usage and procedure as found in a construction business.

The following quote from 11 Am. Jur., Section 244, pages 965, 966, supports the constitutionality of the statute in question:

"§ 244. Delegation of Power to Create Crimes.---The legislature cannot delegate to a board or to an executive officer the power to declare what acts shall constitute a criminal offense. It is competent for it, however, to authorize a commission to prescribe duties on which the law may operate in imposing a penalty and in effectuating the purpose designed in enacting the law. There are numerous cases in which the courts have sustained statutes authorizing administrative

officers to promulgate rules on a specified subject and providing that a violation of such rules or orders should constitute a misdemeanor, punishable as provided in the statute. Nevertheless, where a statute does not provide that the violation of regulations shall amount to a criminal offense, the regulations themselves are ineffectual to create such offense. There must in all cases be statutory authority for declaring that an act amounts to a crime, and in addition the penalty must be fixed by the legislature itself.

In a case where the statute itself prescribes punishment for violation of a regulation of a board or commission, it cannot be said that it is unconstitutional on the theory that legislative power to create crimes is delegated to such a body. An illustration is the holding that the power delegated to the Secretary of Agriculture by the provisions of the forest reserve acts, making criminal the violation of the rules and regulations covering forest reservations made and promulgated by him under authority of such statutes, is constitutional. Similarly, Congress having adopted restrictions on the keeping or setting up of houses of ill fame in the vicinity of places where military forces of the United States are situated can leave the details to the regulation of the Secretary of War and provide for the punishment of those who violate the restrictions. It can also constitutionally empower the Secretary of Commerce and Labor to enforce, without invoking the judicial power, the penalty imposed for bringing into the United States an alien afflicted with a loathsome or dangerous contagious disease, when the official medical examination at the port of arrival discloses that such alien was suffering from the disease at the time of embarkation, the existence of which might have been detected by a competent medical examination then made as the statute requires."

A good annotation of the law on this subject is found in 79 L.Ed., pages 489 through 492.



\* \* \* \* \*

"2. Delegation of power to make administrative rules and regulations.

(a) In General.

A legislative body may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purpose and spirit of the legislation and to carry it into effect; and the action of the legislature in giving such rules and regulations the force and effect of laws does not violate the constitutional inhibition against delegating the legislative function.

Authority to make rules and regulations to carry out an express legislative purpose, or to effect the operation and enforcement of a law, is not an exclusively legislative power, but is rather administrative in its nature.

The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed by the legislature is obvious.

The binding effect of such administrative rules and regulations is derived from the sanction of the legislature itself.

The delegation to executive officers of the power to promulgate administrative rules cannot extend to the making of rules which subvert the statute. The legislature cannot authorize such officers to make rules or regulations contrary to existing statutes, or to repeal or abrogate such statutes.

(b) Prescribing penalty for violation of rules.

The validity of a penalty provided by the legislature for a violation of a rule or order of an administrative board or officer depends upon the right of the legislature to delegate the power to make or promulgate the rule or order. If the board or officer may be vested with this power, there can be no objection, on the ground of delegation of legislative functions, to making the

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violation of the regulations or orders a punishable offense.

There are numerous cases in which the courts have sustained, as against this objection, statutes authorizing administrative boards, commissions, and officers to make and promulgate rules, regulations, and orders on a specified subject, and providing that a violation of such rules or orders should constitute a misdemeanor, punishable as provided in the statute.

However, the legislature cannot delegate to an administrative board the authority to fix the penalty for a violation of orders for regulations which the legislature authorized the board to make. The penalty must be fixed by the legislature itself."

\* \* \* \* \*

The following necessary elements are present in the statute in question: The Arizona Legislature has declared a policy and fixed a primary standard to guide the Registrar of Contractors in carrying out his duties as prescribed by law. The Legislature has conferred upon the Registrar, the power to fill up the details by classification of contractors, pursuant to the law and the custom and usage of the trade. The Legislature has also provided the penalty for a violation of the classifications as set forth by the Registrar. Here, we have the Registrar properly canalized and we also have the penalty fixed by the Legislature itself.

In view of these considerations and of the above cited authority, it is the considered opinion of this Department that the two questions presented in the forepart of this opinion, both should be answered in the negative.

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